No. 90-1192

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

THE CITY OF LOCKPORT, NEW YORK and THE SCHOOL DISTRICT OF THE CITY OF LOCKPORT, NEW YORK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANN GIARDINA HESS
Counsel of Record
DAVID R. WENDT
Attorneys for Petitioner
76 West Avenue
Lockport, New York 14094
(716) 433-4022

Batavia Times Publishing Co.
Batavia N.Y. (716) 344-2000

Questions Presented

1. Whether the interest in property the city attains on the legal tax status date falls within the exceptions to the automatic stay as set forth in Section 546(b) of the Bankruptcy Code.

2. Whether Section 362(b)(3) of the Bankruptcy Code exempts the City's real property tax from the automatic stay.

Parties to the Proceeding

In the Court below, the City of Lockport and the County of Niagara were the appellants and the United States of America was the appellee.

This petition for writ of certiorari is presented on behalf of the City of Lockport.

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THE CITY OF LOCKPORT, NEW YORK and
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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion and judgment of United States Court of Appeals for the Third Circuit, reported at 916 F. 2d 890 (3rd Cir. 1990) is reprinted as Appendix "A". It affirms in all respects a judgment of the United States District Court for the Western District of Pennsylvania, based on a memorandum decision and order reported at 111 B.R. 107 (W.D. Pa. 1989) which is reprinted as Appendix "B". The District Court order affirms the memorandum and judgment of the United States Bankruptcy Court for the Western District of Pennsylvania reported at 95 B.R. 370 (Bankr. W.D. Pa. 1989) which is reprinted as Appendix "C".

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on October 19, 1990. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on writ for certiorari rests upon Section 1254(1) of the Judicial Code (28 U.S.C. Section 1254(1)).

Statutes Involved

11 U.S.C. Section 362 and Section 545 and Section 546(b). NEW YORK GENERAL CITY LAW Section 20(4). NEW YORK REAL PROPERTY TAX LAW Sections 302, 1042, 1060, 1104, 1122, 1306, 1312 and 1332. City of Lockport Charter Sections 217, 266, 268 and 271.

The above statutes are reprinted as Appendix D.

Statement of the Case

On May 16, 1978, the Debtor, Guterl Special Steel Corporation ("Guterl"), was the grantee in a deed that conveyed several parcels of real property situated in the City of Lockport, County of Niagara, State of New York. On October 29, 1981, the Debtor gave a mortgage to Marine Midland Bank, N.A. (Marine) for $7,500,000.00 and to Southern Investors Management Company, Inc. ("SIMCO") for another $7,500,000.00. Both mortgages were recorded on October 30, 1981, in the Niagara County Clerk's Office.

The United States, through its agency, the Economic Development Administration of the United States Department of Commerce ("EDA"), guaranteed repayment of 90% of the principal and interest of the above Marine loan. The Farmers Home Administration ("FmHA") likewise guaranteed repayment of 90% of the principal and interest of the SIMCO loan.

On August 9, 1982, the Debtor filed its Chapter 11 petition in United States Bankruptcy Court for the Western District of Pennsylvania. At the time of filing, the Debtor was current on all real property taxes owed to the City of Lockport ("City"), the Lockport City School District ("School District"), and the County of Niagara ("County").

On or about August 26, 1983, EDA paid Marine $7,883,054.84 representing 90% of the balance due on the Marine note and was assigned all of Marine's right, title, and interest in the debtor's collateral. On or about November 1, 1983, the United States Bankruptcy Court ordered the Debtor to liquidate the collateral secured by the EDA and FmHA mortgages and security interests.

A public sale of the Debtor's assets was held in open court on March 27, 1984. Allegany Ludlum Steel Corporation, the successful bidder, purchased the assets for $9,517,000.00.

After filing its petition, the Debtor failed to pay $395,427.51 in City and School District taxes for 1982, 1983 and 1984. An overview of the various taxing schemes is set forth below.

City Tax

Section 20 of New York's General City Law authorizes the City to tax real property. Section 271 of the City Charter, in turn, states as follows:

> "All general city taxes hereinafter levied in said city shall be a lien upon the lands on which they are assessed, for ten (10) years from the first publication of the notice of such tax or assessment by the Treasurer, and shall have priority in the order of time in which they become liens . . . Such liens shall be superior to any mortgage, judgment or other lien of any nature affecting said premises except state and county taxes and liens in favor of the United States."

In accordance with Section 268 of the City Charter, the City published the notice for the 1983 year taxes on January 4, 1983. The notice for the 1984 taxes were published on January 3, 1984.

Water Tax

Section 217 of the City Charter states: "All water rents and the interest charges thereon until paid, shall be a lien upon the land and building where the water was consumed or supplied". Section 266 of the City Charter

states that unpaid water rents are to be added to the yearly City tax bill and "regarded as the general City tax".

After the Debtor filed its petition, it failed to pay $108,208.95 in water and sewer bills. The City added that amount to the Debtor's 1983 City tax bill.

School District Tax

The Lockport City School District is authorized by Section 1306 of New York's Real Property Tax Law to levy taxes on real property.

Section 1312 of the Real Property Tax Law states as follows:

> "1. School taxes shall become a lien as of the date and hour of the confirmation or final adoption of the school roll by the school authorities. Unpaid interest shall be included in and deemed part of the unpaid tax. Such taxes included in such unpaid interest shall remain a lien until paid."
>
> "2. Priority and parity as between such tax liens and other tax liens shall be determined in the manner prescribed in title two of article nine of this chapter."

The Board of Education for the Lockport City School District (Board) confirmed and adopted the school tax roll for the year 1982-83 on September 13, 1982. The Board confirmed and adopted the school tax roll for the year 1983-84 on September 1, 1983.

Under Section 1332(4) of the Real Property Tax Law, the City must enforce collection of the unpaid school tax in the same manner and at the same time "as though such unpaid taxes were City taxes." In the event that taxes are unpaid, the City shall, and did, pay over to the school district the amount of the unpaid taxes.

Proceeds of Sale Deposited in Escrow

On November 7, 1984, the Debtor deposited $549,550.00 from its September, 1984 sale in escrow with the escrow agent pending resolution of the tax dispute. At that point, the Debtor owed the City of Lockport $440,050.47 in City, Water and School taxes, or 80% of the amount held in escrow.

As of December 28, 1987, the escrow account contained $689,866.75. As of January 1, 1988, the City's taxes plus statutory interest amounted to $587,818.56.

REASONS FOR GRANTING THE WRIT

This petition addresses the conflict between the Third Circuit's decision in *Makoroff v. City of Lockport, et al.*, 916 F.2d 89 (3rd Cir. 1990), attached as appendix "A" and the Second Circuit's decision in *In Re Parr Meadows Racing Association, Inc.*, 880 F.2d 1540 (2nd Cir. 1989) cert. denied 58 U.S.L.W. 3468 (1990). The ultimate issue in both cases is whether or not a municipality possesses an interest in property on its tax status date sufficient to satisfy the exception set forth in Section 546(b) of the bankruptcy code.

This petition also addresses the conflict between the Third Circuit's decision in *Makoroff v. City of Lockport, et al.*, 916 F.2d 89 (3rd Cir. 1990) and the Fourth Circuit's decision in *Maryland National Bank v. City and Mayor of Baltimore*, 723 F.2d 1138 (4th Cir. 1983) regarding the important issue of whether or not a municipality has an ever present interest in real property sufficient to satisfy the exception set forth in Section 546(b) of the bankruptcy code.

The Third Circuit below stated in *Makoroff v. City of Lockport, et al.*, 916 F.2d 89 (3rd Cir. 1990) (*Makoroff*), that the main question is whether the city and county real estate taxes are analogous to liens that can be perfected post-petition and relate back to a pre-petition period.

The Third Circuit, in a sharply divided opinion, held that the city and county acquire an interest in property only when they take the necessary steps required by statute to obtain a perfectible lien. To reach this holding the Court examined New York Real Property Tax Law, the Second Circuit's decision in *Parr Meadows Racing Association, Inc.*, 880 F.2d 1540 (2nd Cir. 1989) (*Parr Meadows*) and their decision in *Equibank, N.A. v.*

Wheeling-Pittsburgh Steel Corp., 884 F.2d 80 (3rd Cir. 1989). The Court concluded that the New York statute did not have a relation back component and therefore no interest existed on the tax status date pre-petition. This ruling as announced by the Third Circuit, is without foundation in New York law and directly contravenes the construction of New York law announced by the Second Circuit in *Parr Meadows*. This ruling also prevents the uniform application of the Federal Bankruptcy Code by Federal Courts.

THE CITY OF LOCKPORT HAD AN INTEREST IN REAL PROPERTY PRIOR TO THE DATE THE DEBTOR'S PETITION WAS FILED.

The Third Circuit Court failed to correctly apply *Parr Meadows Racing Association, Inc.*, 880 F.2d 1540 (2nd Cir. 1989) to the case at hand. *Parr Meadows* states after examining the provisions of the New York Tax Act that:

> . . . we hold that the County obtains an "interest in [the] property" sufficient to fall under Section 546(b) on June 1, the tax status date.

The key distinction brought forth by the Court in *Parr Meadows* was that the "interest in [the] property" created on the tax status date was a sufficient interest to satisfy 11 U.S.C. Section 546(b). Therefore, if the City of Lockport had a pre-petition interest, then the City's interest is perfectible post-petition and exempt from the automatic stay provision of 11 U.S.C. Section 362 and the trustees avoidance powers pursuant to 11 U.S.C. Section 546(b).

N.Y.R.P.T.L. Section 302 (McKinneys) which was the applicable statute in effect in 1982, sets the taxable status date of real property in a city as the first day of May. Therefore, the tax status date for Guterl's 1983 tax was May 1, 1982.

The Third Circuit Court in *Makoroff* recognized that the tax status date in New York did occur prior to the filing of the Debtor's Petition but failed to recognize the creation of "an interest in property" on the tax status date sufficient to satisfy 11 U.S.C. Section 546(b).

The Third Circuit relies on the relation back concept set forth in *In Re Yobe Electric, Inc.*, 30 B.R. 114 (Bkrtcy. W.D. Pa. 1983), *aff'd* 728 F.2d 207 (3rd Cir. 1984) and reaffirmed in *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3rd Cir. 1989). The holding requires that the statute in question provide for the post-petition lien to relate back to an interest created prior to the filing.

The Third Circuit wrongfully applied the relation back concept to the *Makoroff* case. The relation back concept set forth in *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3rd Cir. 1989) is founded in West Virginia law. New York law makes no mention of the relation back concept and the Second Circuit, being fully aware of the relation back concept, correctly construed New York law recognizing a pre-petition interest in property as of the tax status date sufficient to satisfy Section 546(b) of the bankruptcy code.

Third Circuit Judge Weis in his dissenting opinion points out the downfall of the majority's application of *Parr Meadows* when he states:

> "The Bankruptcy Code is national law and should be applied uniformly by the federal courts. When Congress wished to allow variation dependent on state law, it made that point specifically. It did so here to the extent of incorporating state law into section 546(b). That, however, does not mean that congress envisioned disparity in the interpretation of an identical state statute by various federal courts.

> This court's failure to defer to the *Parr Meadows* holding means that municipalities and counties in New York governed by the same state statutes are treated differently depending on the location of the bankruptcy court in which the proceeding is filed. This result frustrates Congress' intent to have the Bankruptcy Code interpreted in the same way in all parts of the country." 916 F.2d at 898.

Since the tax status date does create "an interest in [the] property" sufficient to satisfy 11 U.S.C. Section 546(b) then at the very least, the City would be entitled to collect taxes and water rents due and owing for the year 1983.

SECTION 362(b)(3) EXEMPTS THE CITY'S REAL PROPERTY TAXES FROM THE AUTOMATIC STAY.

Section 362 of the Bankruptcy Code stays all acts to create or perfect an interest in a Debtor's property after a Chapter 11 petition is filed. However, Section 362(b)(3) and 546(a) exempt from the reach of the stay any act that can perfect a pre-existing interest in property if local law allows such perfection against an intervening owner. As explained above, the City of Lockport had an interest in the Debtor's real property before the Debtor filed its Chapter 11 petition on August 9, 1982. Moreover, the applicable New York law allows the City of Lockport to perfect that interest against any person that hypothetically acquired rights in the Debtor's property before the City perfected its rights.

The seminal case on real property taxes and the applicability of the automatic stay is *Maryland National Bank v. City and Mayor of Baltimore*, 723 F.2d 1138 (4th Cir. 1983) (*MNB*). In *MNB*, the Fourth Circuit Court of Appeals faced a situation similar to the situation faced in this case. In *MNB*, as here, the Bankruptcy Court

ordered the Debtor's property sold free and clear of all liens and the proceeds were transferred to an escrow account. In *MNB*, as here, the sale did not generate enough proceeds to satisfy the first mortgage and post-petition real property taxes. In *MNB*, as here, the first mortgagee bank argued that the Trustee's avoidance powers under Section 545 allowed the Trustee to avoid the City's post-petition tax lien.

In rejecting the Bank's argument, the *MNB* Court examined the restriction that Section 546(b) places on the Trustee's avoidance powers. The Court in *MNB* basically stated that if a party has a pre-petition interest in property, and if the local law allows the interest holder to perfect his interest and cut off an intervening person who acquires rights in the property, then the Trustee is also subject to the perfection. 723 F.2d at 1141-2.

The *MNB* Court then turned to Maryland law to see if the City had an interest in property. The Court looked at two legal propositions. The first was that at a judicial sale of land, the seller had to pay the taxes before he could make any distributions. The second was that a buyer of real property in Maryland had no power to remove real property tax liens that pre-existed his ownership—a familiar proposition, said the Court. These two propositions, led to an ever present interest by the City of Baltimore in real property for the payment of real property taxes. Furthermore, the Court noted, under Maryland law that,

> "No entity acquiring rights in real property in Maryland can prevent the subsequent perfection of the State's interest to secure payment of its real property taxes."
> 723 F.2d at 1143.

Thus, under the *MNB* decision, here is a two part test to determine if real property taxes are exempt from the automatic stay; 1. Is there an interest in property? and 2. Can that interest be perfected against a party that subsequently acquires an interest in the property? If the answer to both questions is yes, then the Trustee cannot avoid the lien that is perfected post-petition.

Turning to the City of Lockport's case, and using the *MNB* analysis, New York State law gives the City an interest in real property for unpaid real property taxes. Under New York State's General City Law and the City of Lockport charter, the City can have a tax sale, *see* N.Y. RPTL Section 1060 (McKinneys); foreclose on its tax lien, *see* N.Y. RPTL Section 1104 (McKinneys); or conduct bulk sales, *see* N.Y. RPTL Section 1042 (McKinneys). All three devices work irrespective of whether or not the current owner was the owner of the property at the time the delinquent taxes arose. *See, e.g.*, N.Y. RPTL Section 1122 (3)(b) (in foreclosure action, name of last known owner is published in list of delinquent taxes). Thus, the interest can be perfected against an intervening property owner. As the *MNB* Court said, it is a familiar proposition that an owner cannot remove the tax liens that accrued during the prior ownership.

In addition to the City's broad power to sell the land and divest an intervening owner of his interest, judicial sales have no effect on taxes under New York law. They remain a lien and subject to enforcement by the municipality. See 1. Mortgages and Mortgage Foreclosure in New York Section 27:6 (Rev Ed). The City's interest, therefore, can be perfected against intervening lienors as well as purchasers. Thus, the City of Lockport in this case has the same rights and

protections that gave the City of Baltimore a pre-petition interest in the *MNB* case. Therefore, the City of Lockport should be allowed to recover not only the 1983 taxes because of their pre-petition interest but they should also be allowed to recover the post petition taxes. See *MNB*.

As stated in *MNB*:

> "it is not a bankruptcy objective to make a secured creditor better off than it would have been had there been no bankruptcy at all."

To deny recovery of all these taxes would allow the secured party to receive a windfall by placing that party in a better position because of the filing of a bankruptcy petition than they would have been in had no petition been filed.

Conclusion

Based on the arguments set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANN GIARDINA HESS
Counsel of Record
Assistant Corporation Counsel
DAVID R. WENDT
Corporation Counsel
City of Lockport
City Hall
Lockport, New York 14094
(716) 433-1344

Attorneys for Petitioner

Dated: January 16, 1991

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit, Dated October 19, 1990

Filed October 19, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-3158 and 90-3159

STANLEY G. MAKOROFF,
TRUSTEE FOR GUTERL SPECIAL
STEEL CORPORATION

v.

THE CITY OF LOCKPORT, NEW YORK,
THE SCHOOL DISTRICT OF LOCKPORT,
NEW YORK and COUNTY OF NIAGARA,
NEW YORK

COUNTY OF NIAGARA, NEW YORK,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 89-00482)

Argued August 20, 1990

Before: STAPLETON, COWEN and WEIS,
Circuit Judges.

(Filed October 19, 1990)

DAVID R. WENDT (Argued)
76 West Avenue
P.O. Box 1009
Lockport, New York 14094

JOHN F. BATT (Argued)
Niagara County Courthouse
Lockport, New York 14094

ALLEN D. MISKELL
City of Lockport Corporation
Counsel
One Locks Plaza
Lockport, New York 14094

THOMAS H. BRANDT
City of Lockport Corporation
Counsel
929 Lincoln Avenue
Lockport, New York 14094
Attorneys for Appellant

JAMES K. WHITE (Argued)
CHARLES A. MOSTER
United States Department of Commerce
Office of General Counsel
14th & Constitution Ave., N.W.
Room 5896
Washington, D.C. 20230
Attorney for Appellee

OPINION OF THE COURT

COWEN, *Circuit Judge.*

This bankruptcy appeal raises the question whether the creation of post-petition liens for unpaid city and county real property taxes on a bankrupt estate violates the automatic stay provision of 11 U.S.C. § 362(a)(4) (1979). The district court held it does because the automatic

stay prohibits the creation of a lien after the bankruptcy petition, and there was no exception which took this case outside the application of the automatic stay. We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we agree with the district court's conclusion that the liens in question were created after the bankruptcy petition, and the city and county liens do not relate back to a pre-petition interest in the debtor's property, we will affirm.

I.

Debtor, Guterl Special Steel Corporation ("Guterl"), owned property in the City of Lockport (the "City"), County of Niagara (the "County"), in the State of New York. In 1981, Guterl gave mortgages to two banks each in the amount of $7.5 million. Both mortgages were duly recorded. The mortgages were guaranteed by economic development agencies of the United States for 90% of the outstanding principal and interest; one by the Economic Development Administration of the United States ("EDA"), and the other by the Farmers Home Administration ("FmHA"), both of whom are represented by the United States, the Appellee in this case.

On August 9, 1982, Guterl filed a Chapter 11 petition in bankruptcy in the Western District of Pennsylvania. At filing, Guterl was current on all taxes. After filing, however, Guterl failed to pay certain city, school and county taxes on its real property. The City and County, Appellants in this case, have asserted liens on Guterl's property superior to the recorded mortgages in order to secure payment of the taxes owed to them.

On August 26, 1983, EDA paid 90% of the balance due on the outstanding note it had

guaranteed and was assigned all of the bank's right, title and interest in Guterl's collateral. While the record does not indicate what occurred to the note that FmHA guaranteed, we may assume for the purpose of this appeal that at some point, FmHA paid 90% of the balance due on the note it had guaranteed in return for an assignment of the bank's right, title and interest in the collateral. In November, 1983, the bankruptcy court ordered Guterl to liquidate the collateral securing the EDA and FmHA mortgages. In March, 1984, the land was sold in a public sale for $9.5 million, $549,550 of which Guterl has deposited in an escrow account pending resolution of this dispute. This appeal concerns the right to the money in that escrow account.

The United States, representing the EDA and the FmHA, claims that it has a first priority security interest in the proceeds from the sale of Guterl's property (and therefore is entitled to the money in the escrow account) because the EDA and FmHA hold notes secured by duly recorded mortgages on the property. On the other hand, the City and County of Niagara claim that they are entitled to the proceeds because they hold super-priority tax liens on the property for unpaid city, school and county taxes.

The trustee in bankruptcy initiated this proceeding under Rule 7001 of the Bankruptcy Rules to determine priority of liens on the debtor's property in order to adjudicate the competing rights to the proceeds in the escrow account. The bankruptcy court held that the city and county tax liens were null and void because the liens had been created after Guterl's petition in bankruptcy, in violation of the automatic stay, 11 U.S.C.

§ 362(a)(4). The district court affirmed the holding of the bankruptcy court and this appeal followed.

II.

The automatic stay provision of the bankruptcy code, 11 U.S.C. § 362, is "one of the fundamental debtor protections provided by the bankruptcy laws." H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6296. It protects creditors by giving them equal treatment and is an aid to debtors by giving them a "breathing spell." *See H & H Beverage Distribs. v. Department of Revenue*, 850 F.2d 165, 166 (3d Cir.), *cert. denied*, 488 U.S. 994 (1988).

Unless an exception applies, the automatic stay prohibits "any act to create, perfect, or enforce any lien against the property of an estate." 11 U.S.C. § 362(a)(4). Section 362(b)(3) creates an exception to the automatic stay and allows "any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title." 11 U.S.C. § 362(b)(3) (1979). Section 546(b), in turn, provides that the rights and powers of the trustee under section 545 to avoid statutory liens, *see* sections 545(1)(A) and 545(2), are subject to "any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." 11 U.S.C. § 546(b) (1979).

The legislative history of this provision explains, "if an interest holder against whom the trustee would have rights still has, under applicable nonbankruptcy law, and as of the date of the petition, the opportunity to perfect his lien against

an intervening interest holder, then he may perfect his interest against the trustee." H.R. Rep. No. 595, 95th Cong., 1st Sess. 371 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6327; S. Rep. No. 989, 95th Cong., 2d Sess. 86 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5872. The legislative history also indicates that "generally applicable law" means "provisions of applicable law that apply both in bankruptcy cases and outside bankruptcy cases," and warns that "[the phrase] is not designed too [sic] give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases." *Id.*

In essence, these provisions establish an exception to the bar of the automatic stay where a creditor has a pre-petition interest in property that can be perfected under state law within a given time. The creditor, in that circumstance, does not lose his preferred status merely because he does not perfect his interest until after the debtor has filed for bankruptcy. *See In re Parr Meadows Racing Assoc., Inc.*, 880 F.2d 1540, 1546 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 869 (1990).

The paradigm section 546(b) case would arise in a state which has adopted the Uniform Commercial Code ("U.C.C."). Under various sections of the U.C.C., a perfected security interest relates back to either the filing of a financing statement or the date that the security interest attaches. *See, e.g.*, H.R. Rep. No. 595, 95th Cong., 1st Sess. 371-72 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6327-28; S. Rep. No. 989, 95th Cong., 2d Sess. 86-87 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News

5787, 5872-73.[1] Where a state law allows a creditor to perfect his security interest within a certain period of time after the security interest attaches, section 546(b) allows the creditor to complete the steps required under state law for perfection. Without section 546(b), a creditor could not perfect his security interest without violating the automatic stay, even if all that remained was a ministerial act.

The purpose of this exception to the rule of the automatic stay is to "protect, in spite of the surprise intervention of [the] bankruptcy petition, those whom State law protects" by allowing them

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1. Under U.C.C. § 9-301(2), for example, a secured creditor may perfect a purchase-money security interest within ten days after the debtor has come into possession of the collateral, even if the creditor has not previously filed a financing statement. Once the secured creditor's interest is perfected by filing, his priority relates back to the date when his security interest attached, provided that filing occurs within ten days of attachment. Accordingly, the purchase-money security interest thus perfected will defeat a non-purchase-money security interest that was perfected after the debtor took possession of the purchase-money collateral (assuming that the non-purchase-money security interest does not itself relate back to a time before the debtor took possession of the purchase-money collateral).

Under section 546(b), perfection of a purchase-money security interest under U.C.C. § 9-301(2) would defeat a hypothetical judicial lien creditor on the date of the petition in bankruptcy. In other words, the automatic stay under section 362(b)(3) does not forbid the creditor from taking steps to perfect a purchase-money security interest after the petition is filed. Such a *perfection* of a lien is not considered the *creation* of a lien under the U.C.C. H.R. Rep. No. 595, 95th Cong., 1st Sess. 371-72 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6327-28; S. Rep. No. 989, 95th Cong., 2d Sess. 86-87 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5872-73.

to perfect an interest they obtained before the bankruptcy proceedings began. H.R. Rep. No. 595, 95th Cong., 1st Sess. 371 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6327; S. Rep. No. 989, 95th Cong., 2d Sess. 86 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5872; *see also Parr Meadows*, 880 F.2d at 1546.

The question which we must consider is whether the city and county real estate taxes are analogous to liens that can be perfected post-petition and relate back to a pre-petition period. If the city and county tax liens date back to a pre-petition interest in debtor's property, there would be no violation of the automatic stay in this case, even if the tax liens were perfected post-petition. The statutory liens of the City and County would therefore "trump" even the prior recorded mortgages of the EDA and the FmHA.

III.

We begin our analysis by examining the taxing statutes which give rise to the city and county liens.

Section 271 of Lockport's City Charter provides:

> All general city taxes hereinafter levied in said city shall be a lien upon the lands on which they are assessed, for ten years from the first publication of the notice of such tax or assessment by the treasurer, and shall have priority in the order of time in which they become liens. . . . Such liens shall be superior to any mortgage, judgment or other lien of any nature affecting said premises except state and county taxes and liens in favor of the United States.

On January 4, 1983, the City published the notice for the 1983 City tax. On January 3, 1984, the City published the notice for the 1984 City tax.

Under sections 217 and 266 of Lockport's City Charter, water rents are also liens on the real estate where consumed or supplied and are added to the yearly city tax bill.

Lockport's school tax is authorized by section 1306 of New York's Real Property Tax Law. Section 1312(1) of that law states:

> School taxes shall become a lien as of the date and hour of the confirmation or final adoption of the school tax roll by the school authorities. Unpaid interest shall be included in and deemed part of the unpaid tax. Such taxes including such unpaid interest shall remain a lien until paid.

N.Y. Real Prop. Tax Law § 1312(1) (McKinney's 1989). The City is directed by statute to collect unpaid school taxes in the same manner as unpaid city taxes. If school taxes remain unpaid, the City must pay the sum to the school district and assume collection responsibilities. On September 13, 1982, the School District confirmed and adopted the school tax roll for 1982-83. On September 1, 1983, it confirmed and adopted the school tax roll for 1983-84.

The County levies its taxes under the authority of section 900(1) of the New York Real Property Tax Law, which provides:

> Not later than the thirty-first day of December in each year, the board of supervisors of each county shall levy the taxes for the county upon the basis of the full valuation of the taxable real property determined in accordance with title one

> or title two of article eight of this chapter and shall enter in a separate column on the assessment roll of each city and town opposite the assessment of each parcel of real property, the amount to be paid as a tax thereon.

N.Y. Real Prop. Tax Law § 900(1) (McKinney's 1989). On December 21, 1982, the County adopted the county taxes for 1983 by resolution. On December 20, 1983, the County passed a similar resolution adopting county taxes for 1984.

IV.

Based on these taxing statutes, the City and County argue that they did not violate the automatic stay in bankruptcy by assessing taxes against Guterl after it filed its petition under Chapter 11 on August 9, 1982, although all steps to assess the taxes were taken after that date. The City and County contend that they did not violate the bar of the automatic stay because their assessments of city, school and county taxes fall within the exception of section 546(b) to the automatic stay which allows a creditor to perfect liens post-petition that relate back to a pre-petition interest in a debtor's property. The pre-petition "interest" that the City and County claim to have does not arise from any taxing statute. Rather, their "interest" is the interest that sovereign powers have over all property within their jurisdiction. In essence, the City and County ask us to find that they have an ever-present interest in real property located within their jurisdiction. In support of this request, they refer us to *Maryland Nat'l Bank v. Mayor of Baltimore*, 723 F.2d 1138, 1142-43 (4th Cir. 1983), which held that the imposition of a property tax by the State

of Maryland pursuant to its taxing statutes was the last step required to perfect the State's longstanding interest in real property located within its jurisdiction. On that basis, the *Maryland* court allowed a local government to attach a super-priority tax lien to real property after the debtor/property-owner filed its petition in bankruptcy. The court reasoned that the local government had a pre-petition "interest" in property which it merely perfected post-petition under 11 U.S.C. § 546(b). We have previously had occasion to consider this view. *See Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80, 85-86 (3d Cir. 1989). In *Equibank*, we declined to adopt the argument that a state has an ever-present interest in property which it can perfect post-petition under section 546(b).

While it may be true in the abstract that a state has an ever-present interest in all property within its jurisdiction, section 546(b) requires something more. Section 546(b) provides that the rights and powers of the trustee under section 545 to avoid statutory liens are subject to "any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." 11 U.S.C. § 546(b). We read this as requiring that the "generally applicable law" permit (i) perfection, (ii) of an interest in property, (iii) to be effective against an entity that acquires rights in such property before the date of perfection. While the laws in question permit perfection of the City's and County's interest in the debtor's property, we do not believe that the City or County possessed that interest before the date of bankruptcy.

Although the City and County may have an ever-present expectation of collecting taxes on all property within their jurisdiction, they do not have a property interest in a particular piece of real estate until they take the affirmative acts necessary to fix the amount of the tax due and to acquire a lien to the extent of that amount. For instance, city taxes do not become a lien until notice of a tax assessment has been published. *See* section 271 of Lockport's City Charter. With respect to city taxes in 1983, this occurred on January 4, 1983; and with respect to 1984, on January 3, 1984. Guterl petitioned for protection in bankruptcy on August 9, 1982, long before the City had acquired an interest in Guterl's property for the 1983 or 1984 taxes. The same is true of all the other city and county taxes which are at issue. The only assessment which even comes close is the assessment for School Board taxes in 1982-83, where the City School District acquired its interest on September 13, 1982, just one month after Guterl's bankruptcy petition, when it confirmed and adopted the school tax roll as required N.Y. Real Prop. Tax Law § 1312(1).

It is only when the affirmative acts prescribed by statute are taken that the City or County acquires an interest in the property for the purpose of satisfying tax obligations. Since the affirmative acts all occurred after the bankruptcy, neither the City nor County acquired an interest in property pre-petition which they perfected post-petition. They therefore did not fall within the exception of section 546(b) to the automatic stay.

V.

The City and County make an alternative argument that their "interest" in Guterl's property

attaches on the "tax status date" each year. If the City and County had an interest in Guterl's property which attached on the tax status date, post-petition acts to assess outstanding taxes would be acts to perfect a pre-petition interest in property and would fall within the exception to the automatic stay of 11 U.S.C. § 546(b), provided that the tax status date was before August 9, 1982.

In the State of New York, the taxable status of real property is determined according to its condition and ownership as of the taxable status date each year. *See* N.Y. Real Prop. Tax Law § 302 (McKinney's 1984).[2] At all times relevant to this action, the taxable status date for property in cities was May 1st of every year. *See* N.Y. Real Prop. Tax Law § 302(1).[3] May 1st is also the

2. Section 302(1) was amended in 1986, changing the tax status date to March 1st for cities. Because the amendment to section 302(1) is not relevant to this case, we have cited to and quoted from the version of section 302(1) in effect at the time the events giving rise to this case occurred. In any event, the material elements of section 302(1) were not changed by the 1986 amendment.

3. The taxable status of real property in cities and towns shall be determined annually as of the first day of May. All real property shall be assessed in the city or town in which it is situated according to its condition and ownership as of such date. The taxable status of real property in a city or town not subject to the provisions of this section shall be determined as of the date provided by law applicable to such city or town, or if not so provided, then as of the date the assessment roll is completed and filed prior to the hearing of complaints in connection therewith. The date of taxable status of the real property contained on any assessment roll shall be imprinted or otherwise indicated at the top of the first page of each volume of such roll.

N.Y. Real Prop. Tax Law § 302(1) (McKinney's 1984).

taxable status date for property in school districts. N.Y. Real Prop. Tax Law § 302(2) (McKinney's 1984) and § 1302(1) (McKinney's 1989). We will assume that May 1st is the taxable status date for property within the County's jurisdiction.[4] Therefore, the taxable status dates for the 1983 city taxes and 1983 county taxes was May 1, 1982, which falls before the date of the petition, August 9, 1982. Similarly, one or both of the taxable status dates for the 1982-83 and 1983-84 school district taxes fall before the date of the bankruptcy petition. The City and County argue that their interests in Guterl's property attached on this date and that they perfected their interests in accordance with section 546(b) by taking various ministerial steps after the petition was filed. As authority for this approach, the City and County refer us to *Parr Meadows*, 880 F.2d at 1546.

We note, however, that the New York statutes in question make no mention of "relation back" to the taxable status date. Their plain language states that the liens are *created* on a certain date (not the tax status date), after certain acts are taken. *Parr Meadows* addressed a similar question of New York law involving a contest between local taxing authorities and several secured creditors. There, the Second Circuit held that the County's "interest" in the contested property arose on the tax status date. *Id.* at 1546-47.

Although we agree that the value of property is established each year on the tax status date, we

4. Section 302 of the N.Y. Real Prop. Tax Law fixes the taxable status date for cities, towns, school districts and villages, but not counties. The County does not address this issue in its brief. We will assume for the limited purpose of this appeal that the County in this case has the tax status date set by section 302.

decline to adopt the view of our sister circuit that local taxing authorities acquire an interest in the subject property on the tax status date that is sufficient to meet the requirements of section 546(b). Section 546(b) requires in no uncertain terms that the City and County acquire an interest in the property before the date of bankruptcy.

The tax status date merely represents a date when the identity of the taxpayer and the value of the property are established. *General Elec. Co. v. Macejka*, 117 A.D.2d 896, 498 N.Y.S.2d 905 (1986); *Adirondack Mountain Reserve v. Board of Assessors*, 99 A.D.2d 600, 471 N.Y.S.2d 703 *aff'd*, 64 N.Y.2d 727, 485 N.Y.S.2d 744 (1984). Litigation over the tax status date in New York has centered on changes in the value of the property between the tax status date and the date on which taxes are actually assessed; either because the property has been destroyed and is worth less at the time the tax is assessed, 23 Op. State Compt. 375 (1967); 19 Op. State Compt. 11 (1963), or because it has been improved and is worth more, *Roosevelt Nassau Operating Corp. v. Board of Assessors*, 68 Misc.2d 183, 326 N.Y.S.2d 628 (Sup. Ct. 1970), *aff'd*, 41 A.D.2d 647, 340 N.Y.S.2d 871 (1973). We believe that the tax status date is an arbitrary date chosen solely for ease in tax administration. Immediately following that date, the taxing entity still possessed no more than an expectation that taxes will be collected with respect to a particular property. Just as we declined in *Equibank* to hold that such an expectation constitutes an "interest in property," we similarly decline to so hold here. Calling such an expectation an "interest in property" before the amount of the tax is established and a perfectible lien created, stretches the scope of that phrase far beyond its commonly

understood meaning. Rather we conclude that the City or County acquires an "interest in property" only when it has performed the statutory acts necessary to give rise to a perfectible lien. Here, each of those acts was performed after Guterl filed its petition in bankruptcy. Accordingly, neither the City nor the County falls within the section 546(b) exception to the automatic stay.

VI.

We hold that the City and County acquired their interest in Guterl's property each year when they took the steps required by statute to obtain a perfectible lien on that property. Because these steps all occurred after Guterl's bankruptcy petition, the assessment of city and county taxes violated the automatic stay of 11 U.S.C. § 362(a)(4). The judgment of the district court will be affirmed in all respects.

Weis, *Circuit Judge, concurring and dissenting.*

I dissent from the part of the majority ruling that denies recognition for the tax claims for the year 1982-83. The central issues as to those claims, the interpretation of New York State law and its correlation with the Bankruptcy Code, were

decided favorably to local governments by the Court of Appeals for the Second Circuit in *In re Parr Meadows Racing Ass'n., Inc.*, 880 F.2d 1540 (2d Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 869 (1990). In my view, critical considerations of judicial administration and consistent application of federal law require this Court to defer to the holding in *Parr Meadows*.

As the majority explains, an exception to the automatic stay provision, 11 U.S.C. § 362(a)(4), is provided by 11 U.S.C. § 546(b). The latter proviso allows perfection, after the automatic stay provision has been triggered, by operation of "any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection." To be specific, in this case the issue is whether the local governments had "an interest in property" before August 9, 1982, the date the petition in bankruptcy was filed. The majority answers in the negative, despite the holding in *Parr Meadows* which would dictate a contrary result.

The majority recognizes that the reference in section 546(b) to "any generally applicable law" calls for an interpretation of the New York statutes granting taxation power to local governments. The *Parr Meadows* Court undertook that task and, after scrutinizing the legislation and state case law, held that the county acquired an "interest" on the "tax status" date (in that instance, June 1, 1979), twelve days before the bankruptcy petition was filed. 880 F.2d at 1548. That was the Court's holding even though the "lien" was not "perfected," according to the tax statute, until Deeember 1, 1979. *Id.*

According to the Court, "All assessment of property occurs as of that date [tax status date], and from that time forward, the county has a real and identifiable interest in the property which cannot be erased or altered by subsequent events." *Id.* The local government uses the tax status date as the reference point for determining whether the property is taxable and, if so, its valuation. That value is the basis for all taxes due for the year and may not be altered, even though the use or condition of the property may change dramatically before the date the taxes are actually assessed. *Spiegel v. Bd. of Assessors*, ____ A.D.2d ____, ____, 555 N.Y.S.2d 811, 812 (App. Div. 1990). The purpose of this hard and fast rule is to achieve "stability and certainty in the tax structure" because "budgetary requirements . . . are predicated on the assessment roll." *Id.*

The factual scenario in *Parr Meadows* presented precisely the same legal issues as in the appeal presently before us. The majority, however, disagrees with the *Parr Meadows* opinion on the ground that the New York tax statutes do not mention a "relation back" to the tax status date and that the "liens" are not created until December 1st of each year. In support of this conclusion the majority cites *Equibank N.A. v. Wheeling-Pittsburgh Steel Corp.*, 884 F.2d 80 (3d Cir. 1989). This reliance is puzzling because in *Equibank* the Court was applying the tax law of West Virginia, not New York. *Id.* at 85-86.

It is pertinent to note at this point that section 546(b) does not use the word "lien," but requires the acquisition of an "interest" before the bankruptcy petition was filed. *Parr Meadows* recognized the distinction between "interest" and "lien" and commented that the attachment of a

lien was merely one of several steps to be taken "towards the completion of the taxation process and the perfection of the county's interest in the property." *Parr Meadows*, 884 F.2d at 1547.

Any doubt that the *Parr Meadows* appellate Court was aware of the "relation back" issue, is dispelled by reviewing the opinion of the district court from which the appeal was taken. In denying the application of section 546(b) to the 1979-80 taxes, the *Parr Meadows* district court observed, "[n]oticeably absent from this provision [the state tax statute] is any language providing that such tax lien will be deemed perfected as of a date earlier than the date the taxes become due and payable. The most reasonable interpretation of the Suffolk County Tax Act is that it creates a tax lien as of the date the property taxes are due, and that that lien is also automatically perfected as of the date the taxes become due." *In re Parr Meadows Racing Ass'n., Inc.*, 92 B.R. 30, 34 (E.D. N.Y. 1988). The district court then proceeded to discuss legislative history and other bankruptcy courts' decisions.

The Court of Appeals reversed the district court holding and stated, "contrary to the holdings in the district court and the bankruptcy courts, the lien for the 1979-80 tax years is also valid." *Parr Meadows*, 880 F.2d at 1548. "[W]e are satisfied that, under New York tax law, the county did have an interest in the racetrack property before the taxes thereon actually became due and payable and the lien attached." *Id.* at 1546. The majority here espouses the same view of the New York statute that the district court adopted in *Parr Meadows* and Court of Appeals rejected.

The majority's refusal to accept *Parr Meadows* holding on the "relation back" factor is a flat

disagreement on the interpretation of state law. Because New York is within the geographic boundaries of the Second Circuit, I willingly accept the fact that the Court of Appeals for that circuit has greater familiarity with the law of that state than does our court. Certainly in the event of doubt, deference is due the Second Circuit's reading of local law.

The Supreme Court generally accepts interpretations of state law by Courts of Appeals. "Normally, however, we defer to the construction of a state statute given it by the lower federal courts. We do so . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499-500 (1985); *see also Frisby v. Schultz* 487 U.S. 474, 482 (1988).

I see no reason why a similar practice of deference should not be followed by the Courts of Appeals as to other Courts of Appeals. It is cause for serious concern when Courts of Appeals deliberately differ on interpretations of federal law, an area in which they are equally competent. *See* Report of the Federal Courts Study Committee 124-25 (1990). To disagree on questions of state law with courts which have greater familiarity with the pertinent statutes has even less to commend it. It is surely anomalous that Courts of Appeals which extend deference to interpretations of law by administrative agencies do not do so to sister appellate courts created under Article III to decide legal issues. *See Grocery Town Market, Inc. v. United States*, 848 F.2d 392, 396 (3d Cir. 1988) ("It is well settled that the Secretary's interpretation of a statute he is charged with enforcing is entitled to substantial deference");

Smith v. Fidelity Consumer Discount Co., 898 F.2d 907, 914 (3d Cir. 1990) ("an agency's 'interpretation of a statute [it] is charged with enforcing is entitled to substantial deference' . . . [w]e are thus bound to give deference to this permissible interpretation").

The Bankruptcy Code is national law and should be applied uniformly by the federal courts. When Congress wished to allow variation dependent on state law, it made that point specifically. It did so here to the extent of incorporating state law into section 546(b). That, however, does not mean that Congress envisioned disparity in the interpretation of an identical state statute by various federal courts.

This court's failure to defer to the *Parr Meadows* holding means that municipalities and counties in New York governed by the same state statutes are treated differently depending on the location of the bankruptcy court in which the proceeding is filed. This result frustrates Congress' intent to have the Bankruptcy Code interpreted in the same way in all parts of the country. I would therefore follow the holding of the Court of Appeals in the *Parr Meadows* case and reverse the judgment of the district court insofar as it affects taxes for the year 1982-83.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Order of the United States District Court
For the Western District of Pennsylvania
Dated February 12, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

C.A. No. 89-482

IN THE MATTER OF:
GUTERL SPECIAL STEEL CORPORATION,
Debtor,

STANLEY G. MAKOROFF, TRUSTEE FOR
GUTERL SPECIAL STEEL CORPORATION,
Plaintiff-Appellee,

v.

THE CITY OF LOCKPORT, NEW YORK,
THE LOCKPORT CITY SCHOOL DISTRICT
and COUNTY OF NIAGARA, NEW YORK,
Respondents-Appellants.

ORDER

AND NOW, to-wit, this 12th day of February, 1990, it is ORDERED, ADJUDGED and DECREED that for the reasons set forth in-the accompanying Opinion, the bankruptcy court's order dated January 18, 1989 be and hereby is AFFIRMED.

MAURICE B. COHILL, JR.
Maurice B. Cohill, Jr.
Chief Judge

cc: Hon. Judith K. Fitzgerald
United States Bankruptcy Court
for the Western District of Pennsylvania

Stanley G. Makroff, Esquire
Lampl, Sable, Makoroff & Libenson
710 Fifth Avenue, Suite 3000
Pittsburgh, PA 15219

Alan E. Cech,
Assistant U.S. Attorney

Charles A. Moster, Esquire
Office of General Counsel
U.S. Department of Commerce
14th & Constitution Avenues, N.W.
Room 5896
Washington, D.C. 20230

Glen S. Hackett, Esquire
Morton H. Abramowitz, Esquire
Niagara County Attorneys Office
Niagara County Courthouse
Lockport, NY 14094

Thomas H. Brandt, Esquire
Corporation Counsel
City of Lockport
929 Lincoln Avenue
Lockport, NY 14094

Memorandum Opinion of the United States District Court for the Western District of Pennsylvania Dated February 12, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

C.A. No. 89-482

IN THE MATTER OF:
GUTERL SPECIAL STEEL CORPORATION,
Debtor,

STANLEY G. MAKOROFF, TRUSTEE FOR
GUTERL SPECIAL STEEL CORPORATION,
Plaintiff-Appellee,

v.

THE CITY OF LOCKPORT, NEW YORK,
THE LOCKPORT CITY SCHOOL DISTRICT
and COUNTY OF NIAGARA, NEW YORK,
Respondents-Appellants.

MEMORANDUM OPINION

COHILL, *Chief Judge.*

Presently before the Court is an appeal from the United States Bankruptcy Court for the Western District of Pennsylvania of an action to determine the priority of the parties to the remainder of the Debtor's estate. We have jurisdiction pursuant to 28 U.S.C. §158 and Bankruptcy Rule 8001.

ISSUES

The parties have presented the following issues: 1) Whether the bankruptcy court correctly held that the automatic stay provision of the Bankruptcy Code, 11 U.S.C. §362, bars the county from obtaining tax lien status for tax claims created after Guterl filed for bankruptcy; 2) whether the bankruptcy court correctly held that the exceptions to the automatic stay set forth in 11 U.S.C. §§362(b)(3) and 546(b) are inapplicable to these postpetition tax liens; 3) whether the county is entitled to treat its claim only as an unsecured administrative expense; and 4) whether the county may obtain postpetition interest and penalties on its asserted tax liens.

FACTS

The parties in this appeal are the Economic Development Administration of the United States Department of Commerce ("EDA") and the City of Lockport ("Lockport") and County of Niagara ("Niagara"). These parties have stipulated to the facts which we restate from the bankruptcy judge's opinion and order of January 18, 1989 and from the parties' briefs.

The Debtor, Guterl Special Steel Corporation ("Guterl"), owned real estate located in the City of Lockport, County of Niagara, State of New York. On October 29, 1981, Guterl gave two mortgages, one to Marine Midland Bank, N.A. ("Marine") for $7,500,000 and one to Southern Investors Management Company, Inc. ("SIMCO") for $7,500,000. On October 30, 1981 both mortgages were recorded in the Niagara County Clerk's Office.

EDA guaranteed repayment of 90% of the principal and interest of the Marine loan. The Farmers Home Administration ("FmHA") guaranteed 90% of the principal and interest of the SIMCO loan.

On August 9, 1982, when Guterl filed its Chapter 11 petition in the United States Bankruptcy Court for the Western District of Pennsylvania, Guterl was current on all taxes. The Debtor owed no real property taxes to either Lockport or Niagara nor did it owe taxes to the Lockport City School District ("School District").

After filing for bankruptcy, Guterl defaulted on its mortgages. On August 26, 1983 EDA paid Marine $7,883,854.84, representing 90% of the balance due on the Marine note. Marine assigned all its right, title and interest in Guterl's collateral to EDA.

On November 1, 1983 the bankruptcy court ordered Guterl to liquidate the mortgaged collateral. On March 27, 1984 at public sale in open court, the successful bidder purchased the assets for $9,517,000.

After filing for bankruptcy, Guterl failed to pay various taxes on its real estate. Lockport asserts that the Debtor owes base school taxes for 1982 though 1984 and base city taxes for 1983 and 1984, including water and sewer bills in the amount of $108,208.85, for a total of $395,427.51. Niagara claims that Guterl owes it $69,531.10, which, added to Lockport's claim, amounts to total taxes of $464,958.61.

On November 7, 1984 Guterl deposited $549,550 remaining from the September 1984 sale with an escrow agent, pending resolution of the tax dispute. As of December 28, 1987, the account contained $689,866.75. As of January 18, 1989, the date of the bankruptcy judge's opinion, the taxing authorities claimed

entitlement to over $500,000 of that amount. The outstanding balance due on the mortgage exceeds $4 million.

The parties have provided the Court with an overview of the relevant taxing schemes as follows:

City Tax

Section 20 of New York's General City Law authorizes the city to tax real property. Section 271 of the city charter, in turn, states as follows:

> All general city taxes hereinafter levied in said city shall be a lien upon the lands on which they are assessed, for ten (10) years from the first publication of the notice of such tax or assessment by the Treasurer, and shall have priority in the order of time in which they become liens. . . . Such liens shall be superior to any mortgage, judgment or other lien of any nature affecting said premises except state and county taxes and liens in favor of the United States.

In accordance with Section 268 of the city charter, Lockport published the notice for the 1983 taxes on January 4, 1983. The notice for the 1984 taxes was published on January 3, 1984.

Water Tax

Section 217 of the city charter states: "All water rents and the interest charges thereon until paid, shall be a lien upon the land and buildings where the water was consumed or supplied." Section 266 of the city charter states that unpaid water rents are to be added to the yearly city tax bill and "regarded as the general City tax."

School District Tax

The School District is authorized by Section 1306 of New York's Real Property Tax Law to levy taxes on real property.

Section 1312 of the Real Property Tax Law states:

> 1. School taxes shall become a lien as of the date and hour of the confirmation or final adoption of the school roll by the school authorities. Unpaid interest shall be included in and deemed part of the unpaid part of the unpaid tax. Such taxes including such unpaid interest shall remain a lien until paid.
>
> 2. Priority and parity as between such tax liens and other liens shall be determined in the manner prescribed in title two of article nine of the chapter.

The Board of Education for the School District confirmed and adopted the school tax roll for the year 1982-83 on September 13, 1982. The school board confirmed and adopted the school tax roll for the year 1983-84 on September 1, 1983.

Under Section 1332(b) of the Real Property Tax Law, Lockport must enforce collection of the unpaid school tax in the same manner and at the same time "as though such unpaid taxes were City taxes." In the event that taxes are unpaid, Lockport must pay over to the School District the amount of unpaid taxes; Lockport did so in this case.

Niagara relies on Section 900 of the New York Property Tax Law which outlines procedures for creating county tax liens:

> §900. Levy and Extension of taxes
>
> 1. Not later than the thirty first day of December in each year, the board of supervisors in each district shall levy the taxes for the county upon the

> basis of the full valuation of the taxable real property determined in accordance with title one or title two of article eight of this chapter and shall enter in a separate column on the assessment roll of each city and town opposite the assessment of each parcel of real property, the amount to be paid as a tax thereon.

Niagara contends that the county taxes become statutory liens as of the confirmation date of the assessment rolls and the spreading of the tax by the county legislature. This occurs at the annual meeting held late in December each year, when Niagara's budget is adopted. Niagara levied its 1983 taxes by adopting Resolution #416-82 on December 21, 1982 and its 1984 taxes by adopting Resolution #B-41 on December 20, 1983.

DISCUSSION

In this bankruptcy appeal we must balance secured creditor EDA's interest in recovering as much of its claim as possible from the sale of the Guterl assets against Lockport's and Niagara's interests in obtaining payment of property taxes. Because the proceeds of the 1984 sale will not satisfy all of the claims against the Debtor's estate, this Court must determine whether EDA or Lockport and Niagara has priority as to the amount remaining in the escrow account. The crux of the issues here is whether postpetition taxes take preference over the claims of a prepetition secured creditor. We find that under recently decided controlling cases, EDA, as the secured creditor, has priority over the tax claims.

From the date of filing of a bankruptcy petition, the automatic stay provision of the Bankruptcy Reform Act of 1978 ("the Code") prohibits "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. §362(a)(4).

The automatic stay ensures that no creditor receives more than an equitable share of the bankrupt's estate. This equitable treatment requires that all creditors, both public and private, be subject to the automatic stay. *In re Parr Meadows Racing Ass'n., Inc. ("Parr Meadows")*, 880 F.2d 1540, 1545 (2d Cir. 1989), *cert. denied*, 58 U.S.L.W. 3468 (1990). Congress used broad language to prohibit "all entities", 11 U.S.C. §362(a), including a "governmental unit", 11 U.S.C. §101(14), from taking action against a debtor's property during bankruptcy proceedings. *Parr Meadows*, 880 F.2d at 1545.

All actions taken in violation of the stay are void. *In re Eisenberg*, 7 B. R. 683, 686 (Bankr. E.D. N.Y. 1980). *See also In re Parr Meadows Racing Ass'n., Inc. ("In re Parr Meadows")*, 92 B. R. 30, 32 (E.D.N.Y. 1988) (any tax lien claimed by county to attach after filing of Chapter 11 petition void), *aff'd in part, rev'd in part*, 880 F.2d 1540 (2d Cir. 1989), *cert. denied*, 58 U.S.L.W. 3468 (1990).

The bankruptcy court enumerated the following actions taken against Guterl's estate after the bankruptcy petition was filed on August 9, 1982: 1) Lockport published its city tax notices for 1983 on January 4, 1983 and for 1984 on January 3, 1984; 2) the School District confirmed and adopted the school tax rolls for 1982-83 on September 13, 1982 and for 1983-84 on September 1, 1983; and 3) Niagara adopted by resolution the county taxes for 1983 on December 21, 1982 and for 1984 on December 20, 1983. The bankruptcy court concluded that unless an exception to §362 justified these actions, the liens, as violations of §362, were null and void. The bankruptcy court then found that none of the exceptions raised by Lockport and Niagara applied and that, therefore, the city and county had violated the automatic stay. *In re Guterl*, 95 B. R. 370 (Bankr. W.D. Pa. 1989).

Lockport and Niagara argue again on appeal that §§362(b)(3) and 546(b) exempt from the automatic stay any act that can perfect a preexisting interest in property if local law allows such perfection against an intervening owner. Appellants assert that Lockport and Niagara had interests in the Debtor's real property before the petition was filed on August 9, 1982. In addition, they contend that applicable New York law permits Lockport and Niagara to perfect those interests against any entity that hypothetically acquired rights in the Debtor's property before either Lockport or Niagara perfected those rights. Lockport's brief at 8; Niagara's brief at 6.

Section 362(b)(3) of the Code states in part:

> (b) The filing of a petition under . . . this title . . . does not operate as a stay—
>
> (3) under subsection (a) of this section, of any act to perfect *an interest in property* to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title.

11 U.S.C. §362(b)(3) (emphasis added).

Section 546(b) provides in part:

> (b) The rights and powers of a trustee under . . . this title are subject to *any applicable law* that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection.

11 U.S.C. §546(b) (emphasis added).

Lockport and Niagara rely on *Maryland National Bank v. The Mayor and City Council of Baltimore* ("*MNB*"), 723 F.2d 1138 (4th Cir. 1983), to support their position that Lockport and Niagara had a prepetition "interest in property" which by operation of "applicable law" in New York was perfected against EDA.

Interpreting Maryland law, the court in *MNB* stated that Maryland retained the right to require first application of the proceeds from the sale of property to taxes due and payable by the time of distribution. The court further stated that the right is "perfected . . . at the very moment an interest in the real estate . . . arises." The interest, under the generally applicable Maryland law, is "ever-present." *Id.* at 1142. Therefore, "perfection of the right to collect automatically occurs on the first day of July in each and every year." *Id.* at 1142-43 n. 10, (referring to Md. Ann. Code art. 81 §70, *see Id.* at 1141 n. 3). The court also reasoned that Maryland's tax statute constituted "applicable law" under section 546(b). *Id.* at 1143.

We are not persuaded by *MNB*, particularly in light of controlling precedent in Pennsylvania that specifically rejects the *MNB* rationale. In *Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp.* ("*W-P Steel Corp.*"), 884 F.2d 80, 85 (3d Cir. 1989), the Court of Appeals for the Third Circuit found unconvincing a proposition resting on *MNB* that the law creating a postpetition tax lien merely perfected a preexisting state *interest* in collecting tax revenues, "an interest existing perhaps since the creation of that Commonwealth."

The Court of Appeals for the Third Circuit found more persuasive the reasoning of the Court of Appeals for the Second Circuit in a case factually and legally similar to the present one, also involving the interpretation of New York tax law.

In *Parr Meadows, supra*, the secured creditors held valid mortgages on the property, all perfected before the bankruptcy petition was filed. After sale the claims of the secured creditors exceeded the total proceeds of the sale. The county claimed priority, maintaining that all

back property taxes should be paid first. The county relied on annual tax liens, which absent bankruptcy, attached to the property each December 1. *Parr Meadows*, 880 F.2d at 1543.

The court of appeals disposed first of the county's assertion that §362 had not been violated because the tax lien was created by "operation of law" and not by any "affirmative act." The court rejected that argument, enumerating the specific acts required to establish a lien. The court stated: "Thus, the tax liens here did not come passively into being 'by operation of law'; rather, they were created and perfected as a direct result of the county's assessment and taxation process, which consists of several 'affirmative acts' by county, town, and school district officers." *Id.* at 1545 (citing *In re Guterl*, 95 B. R. 370, 373-75 (Bankr. W.D. Pa. 1989)).

The court then addressed in turn the same exceptions to §362 raised by Lockport and Niagara here, that is, §§362(b)(3) and 546(b). The court stated that "statutory exceptions to the automatic stay are to be interpreted narrowly and in accordance with its underlying rationale." *Parr Meadows*, 880 F.2d at 1547.

Under §362(b)(3), in *Parr Meadows*, the secured creditors argued that the county had no interest in the property until December 1 when each year's taxes became due and payable. The county contended that its interest in the property for tax purposes was, as *MNB* held, "ever present" so that a new super-priority tax lien arose each December 1. The court of appeals rejected both arguments. *Id.* at 1546. The court identified the "tax status date," in that case June 1, as the first step in the process to levy taxes and the date on which the state's interest in the property arose for purposes of §362(b)(3). *Id.*

The court of appeals next addressed "applicable law" under §546(b), stating that the provision "was enacted to aid the creditor who. 'surprise[d] [by the] intervention of [the] bankruptcy petition', is prohibited by the automatic stay from perfecting its interest in the debtor's property, but who otherwise would still be permitted to perfect that interest under state law.' *Id.* at 1547 (citing H.R.Rep.No. 595, 95th Cong., 1st Sess. 371, *reprinted in* 1978 U.S.Code Cong. & Admin. News 6327).

The court of appeals determined that §546(b) was designed to provide a one-time exception for a creditor who gave value but had not yet perfected a lien before the petition was filed. Other courts have supported this view in the context of mechanic's liens and purchase money security interests. *See In re Parr Meadows,* 92 B. R. at 34 (purchase money security interest); *In re Yobe Elec., Inc.,* 30 B. R. 114, 117 (Bankr. W.D. Pa. 1983) (mechanic's lien), *aff'd, In re Yobe Elec., Inc.,* 728 F.2d 207 (3d Cir. 1984).

Further, the court recognized that if a state's taxing scheme generally constituted "applicable law" under §546(b), a taxing body could take advantage of a rotating exception, adding another lien at the "front of the priority line" each tax due date. *Parr Meadows,* 880 F.2d at 1547. *See also In re Parr Meadows,* 92 B. R. at 35 (if Congress had intended to except from the automatic stay government's ability to collect postpetition taxes it would have expressly provided for it). The court rejected such a broad exception that would permit the county to collect on its claims as if no bankruptcy petition had ever been filed. *Parr Meadows,* 880 F.2d at 1547.

Because in *Parr Meadows,* the county acquired an interest in the property on June 1, 1979, the tax status date, and the petition was not filed until June 12, 1979,

the county obtained a lien that was perfected on December 1, 1979, when the taxes were due and payable. As to the claims for the following years, since the county did not have an "interest in property" predating the bankruptcy petition to qualify for the §546(b) exception, the court concluded that the creation and perfection of these taxes violated the automatic stay. *Id.* at 1548.

The Court of Appeals for the Third Circuit, deciding Pennsylvania law, has found that "the Commonwealth could not create a lien until it made a formal demand for the full amount due upon completion of [a taxpayer's permitted] appeal and then filed the amount of that liability with the prothonotary." *H & H Beverage Distrib. v. Dept. of Revenue of Pennsylvania*, 850 F.2d 165, 169 (3d Cir.), *cert. denied*, 109 S. Ct. 560 (1988). *H & H Beverage* suggests that a lien is created, not at the beginning of the taxing procedure at the tax status date, but at the end of the taxing scheme after the taxpayer has pursued appeals, neglected or refused to pay, and the amount owing has been docketed by the prothonotary. *Id.*

We observe that lien creation occurs under New York law at the tax status date, *Parr Meadows*, 880 F.2d at 1546, and under Pennsylvania law at the time tax liability has been determined and filed with the prothonotary. *H & H Beverage*, 850 F.2d at 169. Fortunately, we are not called upon to reconcile these cases here. Whatever date the Court of Appeals for the Third Circuit might fix for creation of a lien under New York law, we find that in this case even the earliest acts to create each of the liens were taken after the petition was filed on August 9, 1982.

In its most recent ruling on this issue in *W-P Steel Corp., supra*, the Court of Appeals for the Third Circuit determined that the lien date was July 1, the date on

which the West Virginia statute dictated that the "lien shall attach." *W-P Steel Corp.*, 884 F.2d at 84. The court found that the 1987 taxes would have become liens on July 1, 1986, long after the automatic stay took effect in April 1985. Therefore the automatic stay prevented creation of those liens.

In *W-P Steel Corp.*, the company argued that the §362(b)(3) and the 546(b) exceptions should apply. The court discussed "applicable law" illustrated by *In re Yobe Elec., Inc.*, 728 F.2d 207 (3d Cir. 1984), a case analyzing postpetition perfection of mechanic's liens. The court stated that the mechanic's lien "related back" to before the petition was filed because the lien had been created before the operation of the automatic stay. In contrast, West Virginia law had not created a lien for the 1987 taxes until the lien attached after the petition was filed. *Id.* at 85.

Distinguishing between the mechanic's lien and unattached tax liens in *W-P Steel Corp.*, the court of appeals stated: "We see no basis, . . . for protecting interests arising post petition, such as the tax liens involved here." The court of appeals cited the legislative history of the Code, stating that the §546(b) exception to the automatic stay was "not designed to give the States an opportunity to enact disguised priorities in the form of liens that apply only in bankruptcy cases." *Id.* at 86.

Here, as in *W-P Steel Corp.*, we find that the purported tax liens, the earliest of which was created on September 13, 1982 after the bankruptcy petition was filed on August 9, 1982, not only violate the automatic stay but do not qualify for an exception. We therefore affirm the bankruptcy court's ruling that the liens are null and void.

Because the amount in the escrow account is insufficient to satisfy the $4 million still owing on the EDA secured claim, we are not called upon to decide if, in the alternative, the postpetition taxes are payable as administrative expenses under §503(b)(1)(B)(i). Also, in light of our decision, we need not decide if Lockport or Niagara can obtain interest and penalties on the amount of the taxes purportedly owing. Thus, we affirm the bankruptcy court's decision that the total sum held in escrow shall be paid to EDA as assignee of the mortgagee.

An appropriate ORDER affirming the decision of the bankruptcy court will issue.

MAURICE B. COHILL, JR.
Maurice B. Cohill, Jr.
Chief Judge

APPENDIX C

Memorandum Opinion of the United States Bankruptcy Court for the Western District of Pennsylvania

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Bankruptcy No. 82-2590

IN RE:

GUTERL SPECIAL STEEL CORPORATION,
Debtor.

Adversary No. 87-0393

STANLEY G. MAKOROFF, TRUSTEE FOR
GUTERL SPECIAL STEEL CORPORATION,
Plaintiffs,

v.

THE CITY OF LOCKPORT, NEW YORK;
THE SCHOOL DISTRICT OF LOCKPORT; NEW
YORK; and COUNTY OF NIAGRA, NEW YORK,
Respondents.

MEMORANDUM OPINION

Before the Court is an action by the Trustee to determine the priority of parties to the remainder of Debtor's estate, same having been liquidated and presently being held in escrow by this Court. The parties

in question, the Economic Development Administration of the United States Department of Commerce ("EDA or mortgagee"), the assignee of the mortgagee as the secured creditor, and the City of Lockport ("Lockport") and County of Niagra ("Niagra") as the taxing authorities, have stipulated to the relevant facts.

The pertinent issues before the Court are as follows:

(1) Did Lockport and Niagra violate the automatic stay by creating postpetition tax liens against Debtor's real property?

(2) Are Lockport and Niagra nevertheless entitled to perfection of their postpetition tax liens pursuant to §546(b)?

(3) If Lockport and Niagra do not possess secured claims, are they entitled to administrative priority claims pursuant to §§503(b) and 507(a)(1)?

A hearing was held wherein the parties presented their arguments, and provided the Court with trial memoranda. Based upon same this Court finds that Lockport and Niagra did in fact create, as opposed to merely perfecting, postpetition liens in violation of the automatic stay provisions of the Bankruptcy Code, and that these liens are null and void *ad initio*. We further find that if the actions of Lockport and Niagra were to be sanctioned under §362, their liens would still be avoidable under §545, and the Trustee would not be impaired by the limitations imposed by §546(b). Having so determined, and it appearing that the amount in escrow is insufficient to satisfy even the EDA's (mortgagee) claim, it is unnecessary for this court to pursue the remaining issue, relating to priority status.

FACTS

Prior to the filing of its bankruptcy petition, Debtor owned several pieces of real estate located in the City of Lockport, County of Niagra, State of New York. On October 29, 1981, Debtor took two (2) $7.5 million mortgages, one to Marine Midland Bank ("Marine") and one to Southern Investors Management Company, Inc. ("SIMCO"). These mortgages were both recorded on October 30, 1981, in the Niagra County Clerk's office. The EDA guaranteed repayment of ninety percent (90%) of the principal and interest on the Midland loan; the Farmers Home Administration ("FMHA") guaranteed ninety percent (90%) of the principal and interest on the SIMCO loan.

Debtor filed its Chapter 11 bankruptcy petition on August 9, 1982. As of that time Debtor owed no real property taxes to either Lockport or Niagra. Subsequent to the bankruptcy filing, Debtor defaulted on its mortgages with Marine and SIMCO. On August 26, 1983, EDA paid Marine $7,883,054.84, which sum represented ninety percent (90%) of the balance due and owing on the Marine loan. As a result of this guaranty payment, EDA was assigned all of Marine's right, title and interest, as mortgages, in Debtor's collateral. Thereafter, on November 1, 1983, this Court ordered Debtor to liquidate the mortgaged collateral; said liquidation was accomplished by a public sale in open court on March 27, 1984. The successful purchaser bid and paid $9,517,000.00.

Although Debtor maintained a current tax status until the commencement of the case, following the filing of its bankruptcy petition Debtor failed to pay various taxes on its four (4) parcels of real estate. The amounts of taxes owed and descriptions thereof are as follows:

Entity	*Type*	*Amount*
Lockport	1982-83 Base School Tax	$ 69,397.27
	1983-84 Base School Tax	78,995.37
	1983 Base City Tax	93,771.15
	1984 Base City Tax	153,263.72
		$ 395,427.51
Niagra	1983 County Tax	$ 33,085.20
	1984 County Tax	36,445.90
		$ 69,531.10
Total Base Tax		$ 464,958.61

Lockport's assertion of its base City Tax arises as a result of the following language found at Section 271 of its City Charter:

> All general city taxes hereinafter levied in said city *shall be a lien*, upon the lands on which they are assessed, *for ten* (10) *years from the first publication of the notice of such tax or assessment* by the Treasurer, and shall have priority in the order of time in which they become liens . . . Such liens shall be superior to any mortgage, judgment or other lien of any nature affecting said premises except state and county taxes and liens in favor of the United States. (emphasis added).

Lockport published the notice for the 1983 tax year on January 4, 1983 and for the 1984 tax year on January 3, 1984.

Pursuant to Sections 217 and 266 of Lockport's Charter, water rents are also a lien on the real estate where consumed or supplied and are added to the yearly City tax bill.

The authorization for Lockport's charge of a school tax against real estate is found in Section 1306 of New York's Real Property Tax Law. Section 1312 of that law states:

> School taxes *shall become a lien as of the date and hour of the confirmation or final adoption of the school roll by the school authorities.* Unpaid interest shall be included in and deemed part of the unpaid tax. Such taxes including such unpaid interest shall remain a lien until paid. (emphasis added).

In accordance with this statutory direction Lockport's Board of Education confirmed and adopted the 1982-83 school tax roll on September 13, 1982 and the 1983-84 school tax roll on September 1, 1983.

As with the unpaid water rates, Lockport is directed by statute to collect unpaid school taxes in the same manner as unpaid City taxes. If said taxes are unpaid, the City must pay the sum to the school district and assume the collection responsibilities.

Niagra asserts the validity of its tax liens by relying on §900 of the New York Property Tax Law which outlines the procedures for creating county tax liens:

> §900. Levy and Extension of taxes
>
> 1. Not later than the thirty first day of December in each year, *the board of supervisors in each district shall levy the taxes for the county* upon the basis of the full valuation of the taxable real property determined in accordance with title one or title two of article eight of this chapter *cnd shall enter in a separate column on the assessment roll of each city and town* opposite the assessment of each parcel of real property, *the amount to be paid as a tax thereon.* (emphasis added).

The County contends that pursuant to said procedure, the county taxes become statutory liens as of the confirmation date of the assessment rolls, and the spreading of the tax by the County legislature. This occurs at the annual meeting during which time the County's budget is adopted, and is held no later than the twentieth (20th) of December of each year. The County levied its 1983 taxes by adoption of Resolution #416-82 on December 21, 1982, and its 1984 taxes by adoption of Resolution #B-41 on December 20, 1983.

On November 7, 1984, Debtor deposited $549,550.00 remaining from its September 1984 sale with an escrow agent pending resolution of this dispute. As of December 28, 1987 said account contained $689,866.75. The taxing authorities claim entitlement to over $500,000.00 of said sum. The outstanding balance owed to the mortgagee is in excess of $4 million.

ANALYSIS

In recent years, some Courts have concluded in a general fashion that postpetition property taxes are to be accorded priority status, either as administrative expenses under §§503(b)(1)(B) and 507(a)(1), or as tax claims entitled to distribution pursuant to §507(a)(7). *In re Trowbridge*, 74 B.R. 484 (Bankr. E.D. Pa. 1987); *In re Carlisle Court*, 36 B.R. 209 (Bankr. D.C. 1983). In both of these cases, however, the parties agreed that postpetition taxes could not rise above prepetition secured creditors. As that is the very crux of the issue at bar, and as those courts provided no rationale for their conclusions, we cannot rely on them for the aforesaid general proposition. Rather, the appropriate starting point is §362 of the Bankruptcy Code relating to the automatic stay.

Section 362(a)(4) is the applicable portion of the statute in the instant case, and it states in pertinent part as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entities, of— . . .
>
> (4) any act to create, perfect, or enforce any lien against property of the estate; . . .

The language "all entities" has been held to include governmental agencies. *In re Parr Meadows Racing Association, Inc.*, 92 B.R. 30 (E.D. N.Y. 1988); *In re Eisenberg*, 7 B.R. 683 (Bankr. E.D. N.Y. 1980); 11 U.S.C. §101(14).

Initially we note that the automatic stay provision is one of the most fundamental rubrics of bankruptcy jurisprudence. It creates a pronounced demarcation, after which all parties must cease any attempts to change their positions in relation to their interests in the debtor. *In re Parr Meadows, supra.* The fundamental motive is twofold: first, to protect the present interests of the creditors, promoting the goal of equal treatment, and avoiding a race to dismember the debtor; and second, and perhaps more important, to provide the debtor with a breathing spell in which to remove itself from the pressures which forced it to seek bankruptcy protection in the first instance. *In re H & H Beverage Distributors*, 850 F.2d 165 (3rd Cir. 1988). This precept is so all-encompassing, courts have held that all actions taken in violation of the stay are null and void, even when the offending party has acted without actual notice of the stay's existence. *In re Eisenberg, supra*, and cases cited therein.

In the case at bar, Debtor filed its Chapter 11 bankruptcy petition on *August 9, 1982.* Lockport published its city tax notices for 1983 and 1984 on *January 4, 1983* and *January 3, 1984.* Lockport's school tax rolls for 1982-83 and 1983-84 were confirmed and adopted on *September 13, 1982* and *September 1, 1983.* Niagra's county taxes for 1983 and 1984 were adopted by resolutions dated *December 21, 1982* and *December 20, 1983.*

Barring the applicability of subsection (b) of §362, and in accordance with §362(a)(4), all of these actions would be clearly violative of the automatic stay, as postpetition actions to create, perfect or enforce liens against property of the estate. Therefore, unless the actions by Lockport and Niagra are protected by one of the enumerated exceptions under §362(b), their respective liens are in violation of the automatic stay and are null and void.

The first exception which must be examined is §362(b)(9), which states in pertinent part as follows:

> (b) The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as a stay—
> . . .
>
> (9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency; . . .

This Circuit has stated that while a governmental unit may *notify* a debtor of a tax *deficiency,* said entity may not *collect* taxes or *create* a lien during the stay:

> More importantly, issuance of the notice was not *tantamount to the creation of a lien.* First H & H was in the midst of an administrative appeal in the state court system, and the Commonwealth cannot obtain a lien until the appeal is resolved. Second, no

> lien is created under Pennsylvania law until the Commonwealth demands the amount, interest, penalty and cost, and the taxpayer neglects or refused to pay. Thus, the Commonwealth could not create a lien until it made formal demand for the full amount due upon completion of the appeal and then filed the amount of the liability with the prothonotary. *Pursuant to §362(a), these are the acts that would violate the stay.* (Emphasis in original).

In re H & H Distributors, supra, at 169.

All parties agree that the actions taken by Lockport and Niagra were much more than mere notification of a deficiency, and therefore, the exception in §362(b)(9) is inapplicable to this case.

The true contention among the parties is whether the actions taken by Lockport and Niagra were acts of lien creation or perfection of a prior interest in the property. As stated previously, mortgagee asserts that the postpetition publications, adoptions and confirmations by Lockport and Niagra were acts *creating* liens. These acts, therefore, would be violations of the automatic stay, 11 U.S.C. §362(a)(4).

Lockport and Niagra contend that their actions fall within the exception provided at section 362(b)(3) which states in pertinent part:

> (b) The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as a stay—
>
> (3) under subsection (a) of this section, of any act to perfect an *interest in property* to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title, . . . (emphasis added).

Section 546(b) states as follows:

> The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to *any generally applicable law* that permits *perfection of an interest* in property to be effective against an entity that *acquires rights* in such property *before the date of such perfection.* (emphasis added).

Section 545(2) provides that:

> The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien— . . .
>
> (2) *is not perfected or enforceable at the time of the commencement of the case* against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists. (emphasis added).

It is manifestly clear that creation, as opposed to perfection, is *not* excepted from the automatic stay. A creditor's interest must be created prior to the petition, needing only to be perfected postpetition. *In re New England Carpet Company, Inc.*, 26 B.R. 934 (Bankr. D. Vt. 1983).

Using this specific dichotomy of interests, Lockport and Niagra assert that their underlying interests were created prepetition and that their various postpetition actions were simply perfections of those interests. Although the Trustee could avoid such liens by the terms of §545(2), Lockport and Niagra assert that their applicable state and local laws allow these acts of perfection, and therefore the trustee would be prohibited from avoiding these liens by §545(b).

The propriety of utilizing §§546(b) and 362(b)(3) in the case at bar requires the absolute endorsement by this Court of two presumptions of law championed by

Lockport and Niagra; first, that their interests in collecting postpetition real estate taxes *antedated* the bankruptcy filing; and second, that their state and local statutes are to be viewed as "generally applicable law." See *In re Parr Meadows Racing Association, Inc., supra.*

The legal argument in the instant case very nearly parallels that made by Suffolk County, the taxing body in *Parr Meadows.* Lockport and Niagra rely, as did Suffolk, upon the Fourth Circuit's decision in *Maryland National Bank v. Mayor and City Council of Baltimore,* 723 F.2d 1138 (4th Cir. 1983), claiming a perpetual, sovereign right and interest in real estate taxes:

> Where, however, immovable and ever-present real estate is at issue, the State's interest in the property for the purposes of real estate taxation is a very real and not-to-be-doubted interest that pre-exists a petition in bankruptcy. The imposition of the lien representing the taxes due for any given tax year is but the manifestation or perfection of that underlying interest.

Id. at 1144, n.14.

All taxing authorities, cloaked in their sovereign reignments, desire the courts to view their interests in the collection of taxes as a supreme function of some eternal regency over the lands and fixtures appurtenant thereto. However, as the Court in *Parr Meadows* stated, the idea that §546(b) contemplated such an ethereal interest is devoid of logic.

> Any present legal interest the County may have in real property taxes can only be created at such time as those taxes *accrue and become due and payable* . . . Until that time, the County's interest in collecting those taxes is *merely hypothetical and anticipatory* in nature.

Parr Meadows, supra at 33. (emphasis added).

Each of the relevant statutes raised by Lockport and Niagra require affirmative, primary actions to initiate lien status for real estate taxes. Lockport's city tax assessments must be published; the school taxes must be confirmed by the school board. Similarly, Niagra's county tax levies must be adopted by resolution. These are the activities which cause the taxes *to be assessed and become due and payable.* Until the tax to be paid accrues, is assessed, and becomes due and payable, Lockport and Niagra merely possess an expectation of future collections. Therefore, the acts of publication, confirmation, and adoption are acts of creation. Even if we were to determine that these actions were simultaneously acts to create and perfect, Lockport and Niagra must lose, because these acts to create and perfect still occurred postpetition in violation of §362(a)(4).

Additionally, a review of the legislative history of Section 546(b) shows that the statutes cited by Lockport and Niagra are not the "generally applicable law" envisioned by Congress when this Section was drafted. Specifically that Congressional Report states:

> The purpose of the subsection is to protect, in spite of the surprise intervention of [a] bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests *as of an effective date that is earlier than the date of perfection.*

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 371 (1977); S. Rep. No. 95-989, 95th Cong. 2d Sess. 86 (1978). (emphasis added.) As an example of such generally applicable law, the drafters cited Section 9-301(2) of the Uniform Commercial Code, which allows a purchase money security interest, perfected within ten (10) days of

its creation, to be considered perfected on the creation date, so as to defeat an intervening perfected creditor. None of the statutes cited by either Lockport or Niagra provide for any perfection of interests to relate to an earlier action. The annual tax liens do not attach to the land *retroactively* to the date of Lockport and Niagra's charter incorporations. Their statutes specifically call for the liens to arise as of the date of publication, confirmation, and/or adoption, respectively. *Leges suum ligent latorem.*

An appropriate Order will be issued.

BERNARD MARKOVITZ
Bernard Markovitz
U. S. Bankruptcy Judge

APPENDIX D

11 U.S.C. §362

§362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> * * *
>
> (4) any act to create, perfect or enforce any lien against property of the estate;
>
> * * *

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

* * *

> (3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

* * *

11 U.S.C. §545

§545. Statutory liens

The trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien—

(1) first becomes effective against the debtor—

(A) when a case under this title concerning the debtor is commenced;

(B) when an insolvency proceeding other than under this title concerning the debtor is commenced;

(C) when a custodian is appointed or authorized to take or takes possession;

(D) when the debtor becomes insolvent;

(E) when the debtor's financial condition fails to meet a specified standard; or

(F) at the time of an execution against property of the debtor levied at the instance of an entity other than the holder of such statutory lien;

(2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists;

(3) is for rent; or

(4) is a lien of distress for rent.

* * *

11 U.S.C. §546

§546. Limitations on avoiding powers

* * *

(b) The rights and power of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective sagainst an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

* * *

11 U.S.C. §20

NEW YORK GENERAL CITY LAW
POWERS OF CITIES

§20. Grant of specific powers

Subject to the constitution and general laws of this state, every city is empowered:

* * *

4. To levy and collect taxes on real and personal property for any public or municipal purpose.

* * *

11 U.S.C. §302

§302. Taxable status date

1. The taxable status of real property in cities and towns shall be determined annually as of the first day of May. All real property shall be assessed in the city or town in which it is situated according to its condition and ownership as of such date. The taxable status of real property in a city or town not subject to the provisions of this section shall be determined as of the date provided by law applicable to such city or town, or if not so provided, then as of the date the assessment roll is completed and filed prior to the hearing of complaints in connection therewith. The date of taxable status of the real property contained on any assessment roll shall be imprinted or otherwise indicated at the top of the first page of each volume of such roll.

2. The taxable status date of real property assessed for school district and village purposes shall be determined in accordance with sections thirteen hundred two and fourteen hundred of this chapter, respectively. The date of taxable status of the real property contained on any village assessment roll shall be imprinted or otherwise indicated at the top of the first page of each volume of such roll.

* * *

§1042. Bulk tax sales authorized

1. Any tax district is hereby empowered, as hereinafter provided, to conduct bulk tax sales of the entire delinquent tax roll offered at any tax sale conducted by it; provided, however, that such tax district may exclude from the bulk tax sale those

delinquent parcels of real property upon which it holds and owns one or more unredeemed tax liens or tax lien certificates at the time of the adoption of the resolution in accordance with the provisions of section ten hundred forty-four of this chapter.

2. Except as herein expressly provided to the contrary, all provisions of law, now or hereafter enacted, relating to tax sales and the enforcement of the collection of delinquent taxes and tax liens by each tax district shall apply to bulk tax sales conducted pursuant to the provisions of this title.

* * *

§1060. Sale of tax liens by cities

1. Notwithstanding the provisions of this chapter, in addition to any right to foreclose tax liens contained in its charter any city is hereby authorized and empowered by local law to provide that the right of such city to receive taxes, special ad valorem levies and special assessments and the liens thereof, may be sold at public sale by such city and that after such sale it may transfer the same to a purchaser and that the city may become the purchaser at such sale or sales under such terms and conditions as may be prescribed in such local tax.

2. Such local law shall provide how frequently the sale shall be held, what rate of interest, not in excess of twelve per centum per annum, may be charged by the purchaser, and shall contain such other provisions as may be necessary effectively to provide for a means of sale of the right to receive taxes, special ad valorem levies and special assessments.

3. The provisions of this chapter relating to the institution of actions for the foreclosure of tax liens shall apply to the foreclosure of tax liens sold pursuant to any such local law.

* * *

§1104. Application of article

1. Notwithstanding the provisions of any general, special or local law, any tax district may elect either title two or title three of this article, or both. Such election shall be evidenced by a resolution to such effect in substantially the following form:

RESOLUTION ADOPTING TITLE(S) ..... OF ARTICLE ELEVEN OF THE REAL PROPERTY TAX LAW IN RELATION TO THE ENFORCEMENT OF DELINQUENT TAXES

Resolved, that from and after ..... (here insert date), the ..... (here insert name of tax district) elects to adopt the provisions of title(s) ..... of article eleven of the Real Property Tax Law for the purpose of enforcing the collection of delinquent taxes in such tax district. Such resolution may be adopted by the governing body of such tax district and a certified copy thereof shall be filed in the office of the county clerk of the county or counties in which such tax district is situated prior to the commencement of the first foreclosure proceeding under this article. Upon the adoption of such resolution, the provisions of the title or titles of this article designated therein shall become applicable to such tax district and in addition thereto the provisions of titles one and four of this article shall by operation of law become applicable to such tax district.

2. Any tax district after a period of at least one year from the adoption of such resolution may rescind such election by the adoption of a resolution to such effect, which resolution shall be adopted and filed in the same manner as the original resolution. Upon the adoption of a rescinding resolution, the provisions of this article shall cease to be applicable to such tax district and the

provisions of the laws in force therein prior to such election, relating to the foreclosure of tax liens, shall again become applicable to such district, together with any amendments to such laws. Neither an election to adopt the provisions of this article or any part thereof, nor an election to rescind the same, shall affect any action or proceeding for foreclosure of a tax lien commenced prior to such election or rescission and such action or proceeding may be continued in the same manner as though such election or rescission had not been made.

3. Whenever any tax district shall have adopted title two, or both title two and title three, of this article, the provisions of such title or titles shall supersede the provisions of all general, special or local laws relating to the foreclosure of tax liens by such tax district. Whenever any tax district has adopted only title three of this article, the provisions of such title shall not affect any existing remedy, action or proceeding for the enforcement of tax liens less than four years old in such tax district, unless such district has elected to reduce the four year period as provided in section eleven hundred twenty of this chapter in which case the reference in this section to a period of four years shall be deemed to be a reference to the period established by the resolution of the tax district.

4. Title one and title four of this article shall be effective only in a tax district which has by resolution adopted title two or title three, or both title two and title three of this article.

* * *

§1122. Filing of list of delinquent taxes

* * *

3. All parcels of real property included in any list shall be numbered serially. The enforcing officer shall file a duplicate of each list in the office of such enforcing officer, in the office of the attorney for such tax district and in the office of the enforcing officer of any other tax district having a right to assess any of the parcels described upon such list. The inadvertent failure of the enforcing officer to include all parcels in such list or all such parcels in the designated area where more than one list is filed shall not affect the validity of any proceeding brought pursuant to this title. Each such list shall be known and designated as the "List of Delinquent Taxes" and shall bear the following caption:

". . . . . Court, ... County.

IN THE MATTER OF FORECLOSURE OF TAX LIENS PURSUANT TO ARTICLE ELEVEN, TITLE THREE OF THE REAL PROPERTY TAX LAW BY . . . . . (insert name of tax district), LIST OF DELINQUENT TAXES".

Where the list comprises parcels in a particular area, the caption shall also generally describe the area covered by the list. Each list shall also contain as to each parcel, the following:

* * *

(b) The name of the last known owner of such parcel as the same appears on the assessment roll of the tax district for the year preceding the calendar year in which such list is filed.

* * *

§1306. Levy of taxes

1. Immediately after a tax shall have been voted by a district meeting for a purpose arising during the current school year, the school authorities shall levy it, make out the school tax roll therefor and annex thereto a warrant for its collection. Where a tax is voted at an annual school meeting for school purposes during the following school year, the school authorities shall prepare the school tax roll therefor and, on or before September first annex thereto a warrant for its collection. They may at the same time levy two or more taxes so voted, and any taxes they are authorized to raise without such vote, and make out one school tax roll and one warrant for the collection of all such taxes. They shall prefix to the school tax roll a heading showing for what purpose the different items of the tax are levied unless the tax is raised to meet the appropriations of the annual budget, in which event the tax roll shall show such information.

2. In city school districts upon adoption of the budget and the completion of the necessary assessment rolls of the city, town or county, as the case may be, the school authorities shall prepare or cause to be prepared a school tax roll for the tax required to be levied as stated in such budget. Such authorities shall, not later than ninety days after the beginning of the fiscal year, confirm such school tax roll and annex thereto a warrant for the collection of such tax. Except as otherwise provided in section thirteen hundred twenty-six of this chapter, the collecting officer shall be required to return such warrant within ninety days after the date of such confirmation.

* * *

§1312. Tax lien

1. School taxes shall become a lien as of the date and hour of the confirmation or final adoption of the school tax roll by the school authorities. Unpaid interest shall be included in and deemed part of the unpaid tax. Such taxes including such unpaid interest shall remain a lien until paid.

2. Priority and parity as between such tax liens and other tax liens shall be determined in the manner prescribed in title two of article nine of this chapter.

* * *

§1332. Enforcement of taxes in city school districts

* * *

4. All school tax rolls and warrants, within twenty days after their return by a collecting officer, shall be filed in the office of the clerk of the city school district, unless the same have been retained by the tax enforcement officer pursuant to agreement, as provided in subdivision two of this section, in which event the statements therein specified shall be filed in the office of the clerk of the city school district. Whenever all the taxes shown on any school tax roll have been fully paid or discharged, such tax roll shall be placed in the custody of the clerk of such city school district. A copy of the school tax roll shall be permanently retained as a public record.

* * *

§C-217. All water rents and the interest and charges thereon shall be, until paid, a lien upon real estate.

All water rents and the interest and charges thereon, until paid, shall be a lien upon the land and buildings where the water was consumed or supplied. The word "water rents" whenever used in this Article shall include uniform monthly, semiannual and annual charges and extra and miscellaneous charges for the supply of water; charges in accordance with meter rates and minimum charges for the supply of water by meter; annual service charges and charges for meters and their connections and for their setting, repair and maintenance; penalties and fines and all lawful charges for the supply of water.

* * *

§C-268. Notice that taxes are payable; fees for collection.

The City Treasurer shall forthwith cause notices to be published once a week, for four (4) consecutive weeks, in all of the daily newspapers then printed and published in said city, and cause such other notices to be given as the Common Council may direct, that city taxes are left with the Treasurer for collection, and that for thirty (30) days after the first publication of such notice, every person, company, corporation or association may pay his, her or their general city, highway and lighting tax to said Treasurer, without any additional charges; for thirty (30) days next thereafter, three-per-centum fees shall be collected on any unpaid balance; for the next succeeding thirty (30) days, five-per-centum fees shall be collected on any unpaid balance; and for the next succeeding thirty (30) days, six-per-centum fees shall be collected on any unpaid balance; and that all such taxes remaining unpaid after said one hundred twenty (120) days, in addition to the said six-per-centum fee, shall bear

interest at a rate of six percentum (6%) per annum, after said one-hundred-twenty day period, on any unpaid balance. If any tax shall remain uncollected at the expiration of the said one hundred twenty (120) days, the Treasurer shall give notice to the person or persons against whom such tax stands charged. The notices shall all bear even date, and shall require said person or persons to pay such unpaid tax to said Treasurer at his office within the term of fifteen (15) days thereafter, with fees and interest thereon; said notices shall be served in the manner and form as notices in the matter of county and state tax as herein specified, and the provisions with reference to the notice and persons serving same, as specified with reference to county and state taxes, shall to all intents apply to the notices herein specified, as far as the same may be applicable; said City Treasurer shall include in his quarterly report to the Common Council all fees imposed in this section and collected thereunder.

* * *

§C-266. Amount of tax to be inserted in tax rolls.

The sum stated and assessed upon each separate parcel of land or personal property, composing the estate of each person, corporation or association, shall be set opposite the description and valuation of such parcels respectively in the last columns of the tax rolls of said city; except in cases where there are items of unpaid local taxes, or sidewalk repair bills, or other unpaid amounts of taxes, which, by virtue of the provisions of this act, are lawful charges and liens on and against any of said parcels of land proper to be placed on said tax rolls; and in such cases the said sum so stated and assessed thereon shall be set down in some convenient column other than the last column, and such other

unpaid items or amounts shall be set opposite to said parcel or valuation in some other convenient column or columns, with a brief note designating each thereof, and the aggregate amount of such general and other taxes, charges and liens shall then be set down in the last column of said tax rolls opposite said parcel of land, and to be taken and regarded in all things as the general city tax therein for that year.

* * *

§C-271. Tax liens.

All general city taxes hereinafter levied in said city shall be a lien upon the lands on which they are assessed, for ten (10) years from the first publication of the notice of such tax or assessment by the Treasurer, and shall have priority in the order of time in which they become liens. If the proceedings to enforce said liens have been stayed by a court or judge, the period of such stay shall not be taken as a part of said ten (10) years. Such liens shall be superior to any mortgage, judgment or other lien of any nature affecting said premises except state and county taxes and liens in favor of the United States.

* * *